FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 619

THE MASON & DIXON LINES, INC.
Petitioner

v.

GENERAL ELECTRIC COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, The Mason & Dixon Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on September 16, 1959, petition for rehearing having been filed October 12, 1959, and having been denied November 25, 1959.

Opinions Below

The opinion of the United States District Court for the Western District of Virginia is reported in 170 F. Supp. 698, and is annexed to the record of the Court below (R. 222 to 238).

The original opinion of the United States Court of Appeals for the Fourth Circuit is reported in 270 F. 2d 780, and is printed herein as Appendix A.

The opinion of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing has not yet been reported but is printed herein as Appendix B.

Record references herein are to Volume I of the Record below.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 16, 1959. A timely petition for rehearing of that portion of the decision awarding indemnity to General Electric Company from Petitioner was filed on October 12, 1959, and was denied November 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254 (1).

Questions Presented

(1) Whether, in an action based on implied indemnity, a shipper is entitled as a matter of law to complete indemnity from a motor carrier for damages paid carrier's employee, injured by overturned truck, where shipper negligently loaded truck and refused to correct dangerous condition when requested by carrier to do so; or whether the carrier is entitled at least to a jury trial of issues of fact, and inferences to be drawn from facts, under appropriate instructions relating to shipper's right to indemnity.

(2) Whether, in an action based on implied indemnity, brought by a shipper against a motor carrier, I. C. C. safety regulations, designed for protection of the public, (49 C. F. R. 192.9 (a) (b), 193.9 (a) (b)), supersede the contractual obligation of the shipper to load and brace

heavy or bulk articles established by Rules 21 and 22 of the published Tariff of the Southern Motor Carriers on file with the I. C. C.

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutes and Regulations Involved

(1) Rule 21, *Heavy or Bulky Articles, Loading or Unloading* and Rule 22, *Dunnage or Temporary Blocking, Racks, Standards, Supports, etc.* of published tariff Southern Motor Carriers, National Motor Freight Classification No. A-3 MF-1 C.C. No. 8, full texts of which are set forth in Appendix A, pages A-9 and A-10.

(2) 49 C.F.R. 192.9 (a) and (b) and 49 C.F.R. 193.9 (a) and (b) full texts of which are set forth in Appendix A, page A-10.

STATEMENT

Originally, Kelly Moretz, a citizen of Tennessee, and an over-the-road truck driver employed by Petitioner, The Mason & Dixon Lines, Incorporated, filed a personal injury action in the District Court for the Western District of Virginia against General Electric Company, a New York Corporation, as a result of injuries suffered when a tractor-trailer Moretz was driving turned over on Highway U. S. 11, near Salem, Virginia. (R. 1) Federal jurisdiction was predicated upon diversity of citizenship. (28 U. S. C. A. §1332.)

Moretz claimed the trailer he was hauling had been negligently loaded (with heavy electrical control panels) by the General Electric Company at its Salem Plant, and that General Electric had not installed bracing of the panels required to make the load secure. (R. 4)

Moretz based his claim on the violation by General Electric of certain Interstate Commerce Commission Rules, specifically Rules 21 and 22 of the National Motor Freight Classification, No. A-3, MF-L C. C. No. 8 (R. 7). He claimed a jury trial. (R. 8)

Subsequently, General Electric filed a third-party complaint against Petitioner, The Mason & Dixon Lines, Incorporated, the employer of Moretz, claiming right of indemnity from Mason & Dixon in the event General Electric should be held liable to Moretz. (R. 20)

Jury trial was had before Judge Thompson in the negligence action of Moretz v. General Electric. (R. 29)

Prior to this trial, Petitioner Mason & Dixon moved the court to dismiss the third-party indemnity action by General Electric on the ground that the "exclusive liability" clause in the Tennessee Workman's Compensation Act was a bar to any claim by General Electric for indemnity as a result of liability to Mason & Dixon's employee who was injured in the course of his employment. (R. 32, 38)

The trial court overruled the motion prior to and during the trial. (R. 32, 121, 191)

At the conclusion of the evidence, the trial court charged the jury in the negligence action covering the various theories of General Electric's liability to Moretz, and after receiving the verdict in favor of Moretz in the amount of $35,000, the court said:

"The Court: Now, Ladies and Gentlemen, I indicated to you in my charge that you could not bring

in a verdict against the Mason & Dixon Lines. There is a legal question involved and I want to submit to you an interrogatory for your consideration. You have heard the instructions I have given you in respect to the duties of all the parties to this action. I now want to submit to you the following Interrogatory:

Interrogatory to the Jury

"Was the Mason & Dixon Lines, Incorporated, guilty of negligence which proximately contributed to the accident and resulting injuries to Kelly C. Moretz?" (R. 211)

The above was the entire charge on the indemnity feature of this case.

The jury's answer was:

"We, the Jury, find that Mason & Dixon was guilty of negligence which proximately contributed to the accident and resulting injuries of Kelly C. Moretz." (R. 212)

After receiving the jury finding, the trial court took the whole case under consideration and ultimately sustained Mason & Dixon's original motion to be dismissed as a third-party defendant. (R. 240) The trial court held, first, that under the facts of the case, the duty to load and brace the electrical panels was upon General Electric and that no contract for safe loading could be spelled out as to Mason & Dixon on which to base a claim for indemnity; second, that the Tennessee Workman's Compensation Act's "exclusive liability" clause was a bar to General Electric's claim. (R. 234)

Appeal was taken to the Court of Appeals for the Fourth Circuit by General Electric on all phases of the case.

The Fourth Circuit affirmed the District Court in the personal injury action, but entered up final judgment in favor of General Electric against Mason & Dixon in the indemnity action.

Rehearing was requested by Petitioner, Mason & Dixon, on the indemnity aspect of the case, but a rehearing was refused.

The personal injury judgment of Moretz has been paid by General Electric.

The following evidence, insofar as indemnity is concerned, is not in dispute:

(1) Kelly Moretz, the Mason & Dixon truck driver, was injured while in the course of employment and covered by Workman's Compensation when his tractor-trailer turned over because its load of heavy, electrical control panels shifted suddenly. (R. 105, 114, 116)

(2) The equipment shifted because the panels were negligently loaded and not adequately braced. The jury's finding is conclusive on this point.

(3) General Electric, the shipper and manufacturer of the panels, had a written contractual obligation to load and brace the equipment in question. The obligation was spelled out in Rules 21 and 22 of the Southern Motor Carriers Tariff, on file with the Interstate Commerce Commission; and General Electric did in fact load the trailer at its Salem, Virginia plant. (R. 60, 64, 133-137)

(4) General Electric, the shipper, had a great deal of experience with the best methods of loading and bracing its own, heavy, bulky, specialized product for transportation. (R. 129, 138, 139, 140)

(5) The faulty loading of the equipment was called to the attention of the shipper by the carrier's representative; the shipper was requested to correct the defect and refused to do so, contending that the load was satisfactorily distributed and braced. (R. 76)

(6) As the direct and proximate result of the shipper's negligence in loading the panels improperly, the carrier's truck driver was injured. The jury finding in the injury action is conclusive.

(7) Mason & Dixon, the carrier, had knowledge of the improper loading by the shipper and failed to correct the condition before its driver took the load out on the road. (R. 83, 97)

The Court of Appeals has found that no jury issue relative to the question of indemnity was presented by this evidence.

Conceding that the contractual relationship between the shipper and carrier required the shipper to load and brace the equipment, and notwithstanding the admitted failure of the shipper to perform this obligation in the original instance and again when requested by the carrier to act, the Court of Appeals made a factual determination that General Electric's conduct entitled the shipper to indemnity *as a matter of law* because "the default of the shipper in the pending case was no greater than that of the shipowner in the cited cases." (Appendix A, page A-15)

Further, in its written opinion denying Petitioner's request for rehearing, the Fourth Circuit apparently found that the only question which is properly submitted to a jury in a claim for indemnity arising out of an alleged breach of warranty for workmanlike service is the conduct of the indemnitee; that whether the conduct of the indemnitor is sufficient to preclude recovery is always a question of law for the court.

REASONS FOR GRANTING THE WRIT

I. *The entry of judgment in the Court of Appeals for respondent has deprived petitioner of its constitutional right to a jury trial.*

Weyerhaeuser S. S. Co. v. Nacirema Company, 355 U.S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958) was decided by this Court on the single issue of the right of one seeking indemnity by way of a third-party complaint to have a jury determination of the factual issues involved.

At 355 U.S. 563 at 567, 568 this Court has said:

> "If in that regard respondent (stevedore) rendered a sub-standard performance which led to foreseeable liability of petitioner (shipowner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery*. The evidence bearing on these issues . . . was for jury consideration under appropriate instructions. These issues were not encompassed by the instructions in the main case, where the test of petitioner's liability was based on failure to perform a non-delegable duty to Connolly. Since the liability of respondent depended on *different principles* . . . all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case." (Emphasis supplied.)

Further, this Court wrote at page 569:

> "In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate . . ."

A reading of *Weyerhaeuser* nowhere discloses that this Court intended the Constitutional guarantee of a jury trial to extend to the party seeking indemnity but to be withdrawn from the one against whom the claim was made.

Weyerhaeuser would appear to make eminently plain the test or standard against which a claim for indemnity based on implied contract must be framed:

(a) Substandard performance leading to foreseeable liability by one party to the contract;

(b) Freedom from conduct on the part of the other party sufficient to preclude recovery.

Although *Weyerhaeuser* does not attempt to delineate the character of conduct which is sufficient to preclude recovery on the part of one seeking indemnity based on implied contract, common sense would indicate that *some type of conduct* must be sufficient to bar a claim for indemnity.

A common sense interpretation of *Weyerhaeuser* would also seem to require that if this Court holds the evidence bearing on the substandard performance of one of the parties to the implied contract is for "jury consideration under appropriate instructions," after the jury has been instructed on the different principles applicable to an indemnity action, this Court would not deny consideration by a jury of any conduct of the party seeking indemnity which might preclude recovery.

See *Shultz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608 (1956):

> "The very essence of its function (the jury's) is to select from among conflicting inferences and conclusions that which it considers most reasonable." 350 U. S. 523 at 526.

No serious contention can be made in the instant case that the jury was permitted to consider the conduct of General Electric in the third-party indemnity action. The jury, of course, in the main case, found that General Electric, the shipper, negligently breached its obligation to load and brace the equipment, for this was the sole basis of the plaintiff's verdict.

Petitioner respectfully dissents from the statement of the Court of Appeals in its opinion denying rehearing

that: "In the pending case the admonition of the *Weyerhaeuser* case was followed." (Appendix B, page B-4). The record simply does not support this statement. In the indemnity action, not only did the trial judge fail to charge the jury on any aspect of the principles of an indemnity case, but the Trial Judge asked the jury the single question of whether or not the carrier was negligent. Thus, the most that a jury ever determined at the trial level was that the shipper and carrier were two, active, tort-feasors, a finding which could never support an award of indemnity in this case. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 74 S. Ct. 277 (1952).

The issue of Respondent General Electric's conduct and its effect on General Electric's right to indemnity were matters for the jury. To deny Petitioner at least a jury determination as to the nature and extent of Respondent's admitted breach of its agreement to load and brace, as it pertains to the indemnity action, was an extreme departure from precedent.

II. *The decision of the Court of Appeals for the Fourth Circuit appears in conflict with Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 *U.S.* 124, 100 *L. Ed.* 133, 76 *S. Ct.* 232 (1956) *and unduly extends the scope of that decision; it is also in conflict with the decision of the Court of Appeals for the Third Circuit in Haguns* v. *Farrell Lines*, 237 *F. 2d* 477 (*3rd Cir.* 1956) *and potentially in conflict with the case of General Electric Company* v. *Irvin and The Mason & Dixon Lines, Inc. now pending before the Court of Appeals for the Sixth Circuit; it further decides a Federal question involving Interstate Commerce Commission regulations in a way that conflicts with applicable decisions of this Court.*

Petitioner concedes that *Ryan* stands for the proposition that one who contracts to perform a service impliedly

agrees to indemnify for damages foreseeably resulting from the contractor's improper performance, Workmen's Compensation statutes notwithstanding.

Petitioner does not agree, however, that *Ryan's* holding should be so extended as to be controlling under the facts of the instant case. Nor does Petitioner believe the Court of Appeals was justified in extending a factual analysis of the several maritime cases involving implied indemnity as the factual test of the default of the motor freight shipper in the pending case.

Ryan and the various "shipping" cases were concerned exclusively with interpreting the stevedoring contract. The latter bears no resemblance to the contractual relationship between a motor freight carrier and the shipper of heavy and bulky goods. The Court of Appeals does not appear to recognize any distinction in attempting to look at the scope of the undertakings between General Electric and Mason & Dixon and comparing the default of General Electric to that of the shipowner.

Moreover, the very portion of *Ryan* quoted by the Court of Appeals points out, at 350 U. S. 134, that as between the contracting parties, one who warrants a particular service cannot use the other party's failure to discover and correct its own breach of warranty as an excuse.

In the instant case, no fact is more plain than that General Electric contracted to load and brace the control panels on Mason & Dixon's trailer; that General Electric breached its obligation in this regard; and that Mason & Dixon simply failed to discover and correct General Electric's own breach.

Under the language of *Ryan*, had Mason & Dixon suffered financial loss it would seem to have been entitled to indemnity from General Electric.

Furthermore, this decision, if permitted to stand, extends the indemnity doctrine of *Ryan* prouounced

wholly in a maritime context into the field of interstate commerce. Since four members of this Court disagreed with the establishment of the *Ryan* indemnity doctrine in the maritime arena, it is submitted as urgent that the instant decision, which extends the *Ryan* principle to non-maritime areas, be reviewed by this Court.

Petitioner also submits as grounds for the granting of this petition that three members of this Court recently dissented from an extension of the *Ryan* doctrine—even in the maritime field—to a situation where the party seeking indemnity created the dangerous condition which gave rise to the judgment for which indemnity was later sought. (Dissent by Justices Harlan, Frankfurter, and Whittaker in *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 3 L. Ed. 2d 413, 79 S. Ct. 445 (1959).) In the instant case, as in *Crumady*, the party required to indemnify at most brought into play a dangerous condition created by the party seeking indemnity.

A somewhat similar situation prevailed in the shipping case of *Hagans* v. *Farrel Lines*, 237 F. (2d) 477 (3rd Cir., 1956), which was decided after *Ryan*, where a stevedore's injuries were found to be the result of the shipowner's own breach of contract, which at the same time violated its duty to the longshoreman and to the stevedore. The Third Circuit had no difficulty in denying the shipowner's claim against the stevedore for indemnity.

Here General Electric owed the truck driver Moretz precisely the same duty as it owed the trucking line, Mason & Dixon—to load and brace the equipment. It violated this duty and Moretz was injured. General Electric should not be permitted to profit by its own wrong; to use Mason & Dixon's failure to discover and correct the former's improper performance as the sole basis for a factual determination, made initially at the appellate level, to award indemnity.

A case identical in most essential respects with the present case is *Irvin v. General Electric Company*, Civil No. 1275, E. D. Tenn., October 9, 1958. That case, in which General Electric also brought a third-party action against The Mason & Dixon Lines, Inc. for indemnity, gave rise to a result in the District Court for the Eastern District of Tennessee contrary to the opinion by the Fourth Circuit Court of Appeals in the instant case. The denial of indemnity by the District Court, in an unreported opinion, is now on appeal to the United States Court of Appeals for the Sixth Circuit (Docket No. 13,798). The case was argued before the Sixth Circuit Court of Appeals on October 17, 1959, but the opinion of that Court—potentially in conflict with the Fourth Circuit opinion which Petitioner now asks this Court to review—has not yet been rendered.

The time limitation applicable to the filing of this Petition for certiorari prevents Petitioner from awaiting the Sixth Circuit's conclusion in *General Electric Company v. Irvin and The Mason & Dixon Lines, Inc.*

Petitioner submits that the potential direct conflict between decisions of the Fourth and Sixth Circuit Courts of Appeal is an added factor to be accorded considerable weight in this Court's determination of whether to grant a writ of certiorari in this case.

Finally, as an additional means of justifying its award of indemnity to the shipper in the pending case, the Court of Appeals has, in effect, rewritten the motor transportation contract between shipper and carrier in interstate commerce. This is in conflict with prior decisions of this Court.

The Fourth Circuit has found that insofar as the truck driver Moretz was concerned, General Electric had the obligation to load and brace its equipment on the trailer; but that with respect to the trucking line, Mason & Dixon, General Electric had no contractual obligation at all in

this regard. The first conclusion follows, else the personal injury verdict could not stand; if General Electric had no duty to load and brace, then it could not have been guilty of negligence to Moretz. The second conclusion also follows or General Electric would necessarily be guilty of improper performance of its contract with Mason & Dixon.

Yet, the finding of the Fourth Circuit appears to be at variance with its own written opinion, which on page 12 (Appendix A, p. A-11) recognizes this court's well-established rule that tariff and classifications are just as much a part of the contract between shipper and carrier as are other regulations of the Interstate Commerce Commission. See *Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, 331, 73 L. Ed. 711, 719, 49 S. Ct. 327 (1929).

The Court of Appeals explains this variance by stating that the contractual obligation upon General Electric to load "was not intended to shift to the shipper a duty ordinarily imposed upon the carrier." (Appendix A, page A-12). It fails to consider, however, that the duty to load and brace equipment of the nature involved in the pending case was in fact *not* shifted to the carrier, nor is such ever the case with respect to bulky goods transported under the tariff here in question.

Thus, the position of the Court of Appeals is that it has found that Interstate Commerce Commission safety regulations, 49 U.S.C.A., Sec. 319, which the court admits on page 8 of its opinion (Appendix A, p A-8) were "designed for the protection of the public," have the effect of declaring null and void the contractual requirements of the published tariff of Southern Motor Carriers, filed with the Interstate Commerce Commission, and heretofore declared by this Court to be a part of the transportation contract between shipper and carrier.

III. *The question here involved is of utmost importance.*

The instant case is of great significance to the American trucking industry. It represents the first extension of the controversial doctrine of *Ryan* from the shipping industry to the even broader field of motor carriers and, at the same time, apparently alters radically what were thought to be contractual obligations of long standing between shippers and motor carriers respecting certain types of cargo.

Inevitably, from this decision will flow a large number of personal injury actions in the Federal Courts all over the nation. Inevitably, the injured truck drivers will sue the shippers, who in turn will implead the trucking lines and seek indemnity implied in law. The pattern and volume of the shipping cases is sufficient evidence of what lies ahead.

While *Ryan* established the right to indemnity implied in law, and *Weyerhaeuser* framed certain principles for the disposition of these claims, it is obvious that additional clarification of this new, complex and rapidly expanding concept of implied contractual indemnity is urgently needed by both the Bench and the Bar.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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